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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 DONALD COLE BURCHETT, )  
10 Petitioner, ) CASE NO. C08-1406-RAJ-BAT  
11 v. )  
12 SPOKANE COUNTY SHERIFF, ) REPORT & RECOMMENDATION  
13 Respondent. )  
14

15 Petitioner is currently incarcerated in the Spokane County Jail in Spokane, Washington.  
16 He has filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his 2001  
17 conviction in King County Superior Court. (Dkt. No. 1).

18 Petitioner challenged the same 2001 conviction in a previous habeas petition, which the  
19 Court dismissed as time-barred. *See Burchett v. Waddington*, Case No. C05-1430-RSL (W.D.  
20 Wash., Order filed October 3, 2006). The instant habeas petition is therefore a second or  
21 successive petition. Federal law provides that before a second or successive habeas petition may  
22 be filed in the district court, “the applicant *shall* move in the appropriate court of appeals for an  
23 order authorizing the district court to consider the application.” 28 U.S.C. § 2244(b)(3)(A)  
24 (emphasis added); *see also* Circuit Rule 22-3(a). This law creates a “gatekeeping” mechanism at  
25 the appellate court for the consideration of second or successive applications in the district  
26 courts. *See Felker v. Turpin*, 518 U.S. 651, 657 (1996). Specifically, it “transfers from the

district court to the court of appeals a screening function which would previously have been performed by the district court . . . .” *Id.* at 664. Permission may be obtained *only* by filing, with the appropriate appellate court, a motion for authorization to file a successive habeas petition with the district court. The court of appeals may authorize the filing of a second or successive application for habeas relief only if it determines that the application satisfies the requirements set forth in 28 U.S.C. § 2244(b)(2).

Petitioner has neither sought nor obtained authorization from the Ninth Circuit to file a second habeas petition. Accordingly, the district court lacks jurisdiction to consider the petition. *See Cooper v. Calderon*, 274 F.3d 1270, 1273 (9<sup>th</sup> Cir. 2001). Therefore, the Court recommends that the instant petition be dismissed without prejudice. A proposed Order is attached.

DATED this 14th day of October, 2008.

  
BRIAN A. TSUCHIDA  
United States Magistrate Judge